

**RICHARD J. HAYES, JR.**

ATTORNEY AT LAW

13809 BLACK MEADOW ROAD

GREENWOOD PLANTATION

SPOTSYLVANIA, VIRGINIA 22553

PRACTICE LIMITED TO MATTERS BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

**ORIGINAL**

ADMITTED IN GEORGIA

TELEPHONE (703) 972-7941

August 6, 1993

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

**RECEIVED**

**AUG 9 1993**

**FCC - MAIL ROOM**

RE: Statement for the Record and Motion to Strike  
Amendment of Section 73.202(b), Table of Allotments  
Berlin, De Forest and Wautoma, Wisconsin  
De Forest Broadcasting Company, Petitioner  
MM Docket Number 93-91 (RM-8197, 8279)

Dear Mr. Caton:

Transmitted herewith, on behalf of De Forest Broadcasting Company, are an original and six copies of its "Statement for the Record and Motion to Strike" in the above-referenced matter.

Should any questions arise concerning this matter, please contact the undersigned, directly.

Respectfully submitted,

By:

*R. Hayes*

Richard J. Hayes, Jr., Esq.

Counsel to De Forest Broadcasting  
Company

RJH:lss  
Enclosure

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON D.C. 20554

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AUG 19 1993

FCC - MAIL ROOM

In the Matter of  
Amendment of Section 73.202(b),  
Table of Allotments,  
FM Broadcast Stations  
(Berlin, De Forest and Wautoma,  
Wisconsin)

)  
) MM Docket No. 93-91  
)  
) RM No. 8197, 8279  
)  
)  
)

TO: Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

STATEMENT FOR THE RECORD AND MOTION TO STRIKE

COMES NOW, De Forest Broadcasting Company, through counsel, with this  
"Statement for the Record and Motion to Strike" in the above-captioned  
proceeding.

De Forest Broadcasting Company was the original petitioner in MM  
Docket 93-91 and requested that a new, first local FM service be added to  
the community of De Forest, Wisconsin. The Federal Communications  
Commission adopted a Notice of Proposed Rule Making (8 FCC Red 2747, MM  
Bur. 1993) which proposed to allot channel 226A to De Forest, Wisconsin as  
that community's first local transmission service, to substitute channel  
284A for channel 272A at Wautoma, Wisconsin. The Notice of Proposed Rule  
Making ("NPRM") invited "Comments" and "Counterproposals." Mark J.  
Kastein, d/b/a Markesan Broadcasting Company ("MBC") filed a  
"Counterproposal" requesting the allotment of channel 284A to Markesan,  
Wisconsin. MBC's "Counterproposal" was placed on Public Notice (RM-8279)

on June 30, 1993. (See Petitions for Rule Making Filed, Report No. 1949). This Public Notice invited "comments" to be filed within a fifteen day time period. MBC filed what it styled "Reply Comments" on July 15, 1993.

De Forest Broadcasting Company has had its legal and engineering counsel review the July 15, 1993 "Reply Comments" of MBC and submits this "Statement for the Record and Motion to Strike" for the following reasons:

1. The pleading offered by MBC does not conform to the Commission's Rules. It is an unauthorized pleading. "Reply Comments" are intended to be limited to matters raised by "Comments" or "Counterproposals." In the context of MM Docket No. 93-91, De Forest Broadcasting Company was the original petitioner requesting a new allotment for De Forest, Wisconsin on channel 226A. MBC filed a "Counterproposal" requesting a mutually exclusive allotment at Markesan, Wisconsin on channel 284A. An allotment on channel 284A at Markesan would have pre-empted the use of channel 226A at De Forest (See: Public Notice "Petitions for Rule Making Filed," Report No. 1949). De Forest Broadcasting Company was the party burdened with the obligation and responsibility for filing "Reply Comments." In filing "Reply Comments," De Forest Broadcasting Company would have been restricted to addressing only those matters raised in the counterproposal. It would not be entitled to present an entirely new or more masterfully worded argument.

In this proceeding, MBC's "Counterproposal" was placed on Public

Notice. The Public Notice, essentially, indicated that the Commission had studied MBC's proposal and found it to be at least technically and legally sufficient to permit it to be considered within the context of MM Docket No. 93-91. That Public Notice did not, in any manner, trigger an entirely new pleading cycle which would entitle MBC to completely restructure its "Counterproposal" after engaging the services of an attorney. MBC's July 15, 1993 "Reply Comments" are nothing more than an attempt to bolster the weak presentation it offered to the Commission in its original "Counterproposal."

As the Commission is aware, inviting the public to "Comment" on a counterproposal in a Rule Making Proceeding, after publication of Notice in the "Federal Register," is intended by the Administrative Procedures Act to provide an opportunity for "Comment" on a matter which, until the point of publication, has not been disclosed to the public. In this case, the public has not been aware of the fact that the use of channel 284A had been considered at Markesan, Wisconsin. MBC had "made its case" by this point. There was nothing further that MBC was required to do. Recognizing that its case was weak, MBC engaged the services of communications counsel (prior to July 15, 1993, MBC was not represented by counsel) and submitted an entirely new "Counterproposal" for channel 284A at Markesan, Wisconsin. MBC raised new arguments regarding first and second aural services, population and geographic coverage and an extensive compendium of market and community data. None of this material was presented in its original

"Counterproposal!" Had it been properly presented, De Forest Broadcasting Company would have been afforded an opportunity to respond to the claims and data through its "Reply Comments."

At this stage, De Forest Broadcasting Company is not procedurally entitled to respond to MBC's so-called "Reply Comments" of July 15, 1993. This very act of procedural unfairness is what the Administrative Procedures Act, as well as the Commission's own rules and policies, seeks to prevent. For this procedural reason, MBC's "Reply Comments" of July 15, 1993 should be "stricken." If MBC's so-called "Reply Comments" of July 15, 1993 are to be accepted by the Commission, they should be accepted for the limited (though procedurally unnecessary) purpose of acknowledging MBC's continued interest in its "Counterproposal." Any other result would be procedurally unfair and would only serve to prejudice the outcome of the proceeding. De Forest Broadcasting Company has a right to rely on procedural fairness and is certain that, upon review of the matter, the Commission will grant this "Motion to Strike."

2. The technical information offered by MBC is incorrect and misleading. MBC seeks to lead the Commission to believe that its "Counterproposal" for a new FM station in Markesan, Wisconsin will provide both first and second aural services. Accordingly, MBC claims that its proposal is superior to the proposal at De Forest, Wisconsin since a new FM station at De Forest will provide only a first local FM service (See

Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982)).

After extensively studying the Markesan market, an engineering analysis (attached hereto) clearly shows that Markesan will provide neither a first nor second aural service. Markesan is adequately served by at least five aural facilities! For instance, as demonstrated by the attached engineering analysis, WPKR-FM, Omro, Wisconsin virtually encompasses the representative area of a theoretical Markesan class A FM station. MBC completely omitted references to all AM service in the Markesan, Wisconsin market. MBC's engineering analysis is incorrect and misleading. Its "Reply Comments" of July 15, 1993 conclude that "Such woeful underservice emphatically dictates the proposed allotment." This statement is both inaccurate and misleading.

3. Markesan is adequately served by five AM and FM services. Its population is only 1,519 persons according to the July 15, 1993 "Reply Comments" submitted by MBC. If one were to divide the Markesan population by the number of AM and FM services received, there would be 303.8 persons per station! A sixth station in Markesan would reduce the population per station to a mere 253.2 persons. Certainly, by this standard, Markesan is very adequately served. One could successfully argue that Markesan is overserved! MBC's statement that De Forest is served by 14 FM and 6 AM stations is wholly unsupported by any engineering analysis. MBC has simply counted the number of stations which serve the Madison market and has assumed that each Madison station serves De Forest. This is factually

incorrect and suffers from the same "sloppy" analytical style which led MBC to claim that a Markesan allotment would provide both a first and second aural service to Markesan. By now, the Commission has undoubtedly come to the conclusion that it would be inadvisable to trust any engineering or other factual representation contained in any of the MBC pleadings.

Assuming, arguendo, that MBC is correct when it claims that De Forest is served by twenty radio stations (which it is not), and that the population to be served by a De Forest allotment is at least 300,000 persons, the population served by each station is approximately 15,000. As indicated above (using the data provided by MBC), a new allotment to Markesan would result in six stations serving a tiny village of 1,519 persons. The population per station would be 253.2.

Clearly, a new allotment at De Forest would better serve the public interest than a new allotment at Markesan. Again, MBC's analysis is faulty and misleading. It is not enough to merely count the number of radio stations in a market (MBC didn't even count correctly), but those stations must be analyzed with regard to the population served. When the correct yardstick is used to measure service to the public, it is clear that a greater diversity of expression would be achieved by adopting a Report and Order which grants a new allotment at De Forest. Any other analysis leads only to an apples/oranges comparison. As MBC stated on Page Seven of its July 15, 1993 "Reply Comments," "Where the larger community of the two has

fewer services, the Commission has made the allotment to the larger community." De Forest Broadcasting Company agrees with this result and urges the Commission to favor an allotment to De Forest, Wisconsin on this basis and for all of the other reasons enumerated in its "Petition for Rule Making."

De Forest is located thirteen miles from Madison, Wisconsin. An allotment at De Forest would not place a city-grade (3.16 mV/m) signal over the city of Madison nor would all of the city of Madison receive a 1.0 mV/m signal. Conversely, not all Madison stations would serve De Forest with a 1.0 mV/m signal (or better). MBC claims that a De Forest allotment would become "just another Madison station." This is far from true. De Forest and Madison are separate and distinct communities with different needs and problems. These communities may be located in the same "county" but the similarities stop there. Madison is a large, urban area. De Forest is suburban. By way of analogy, Washington, D.C. and Manassas, Virginia are approximately the same distance from each other as Madison and De Forest but it cannot be argued that Manassas and Washington, D.C. have the same problems and needs any more than Madison and De Forest have the same problems and needs. De Forest seeks to further develop its own identity and a first FM service would help it to achieve that goal.

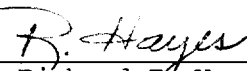


CONCLUSION

For the foregoing reasons, the unauthorized pleading submitted by MBC should be "stricken" from the record. The "Statement for the Record" above, seeks to correct inaccurate and misleading statements made by MBC. Since the information provided by De Forest Broadcasting Company may very well prove to be decisionally significant, it is respectfully requested that the "Statement for the Record" provided by De Forest Broadcasting Company be included in the record of the proceedings in MM Docket No. 93-91.

Respectfully submitted,

De Forest Broadcasting Company

By:   
Richard J. Hayes, Jr.  
Its Attorney

Date: August 6, 1993

Richard J. Hayes, Jr., Esq.  
13809 Black Meadow Road  
Spotsylvania, Virginia 22553

(703) 972-2690

CERTIFICATE OF SERVICE

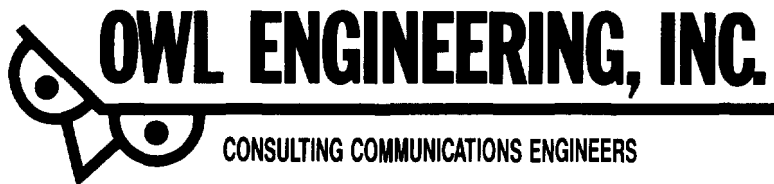
I, Linda Simms, Secretary to Richard J. Hayes, Jr., Esq., hereby certify that copies of the foregoing were sent via U.S. first class mail, postage prepaid, or as otherwise indicated, to each of the following, on this 6th day of August, 1993.

Jerold L. Jacobs, Esq.  
Rosenman & Colin  
1300-19th Street, N. W.  
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Washington, D. C. 20036  
(Counsel to Kingsley H. Murphy, Jr.)

Julie A. Blaser d/b/a  
Wautoma Radio Company  
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Green Bay, Wisconsin 54303

John Wells King, Esq.  
Haley, Bader and Potts  
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Washington, D. C. 20036  
(Counsel to Markesan Broadcasting Company)

  
\_\_\_\_\_  
Linda Simms



CONSULTING COMMUNICATIONS ENGINEERS

1306 W. County Road F, St. Paul, MN 55112  
(612) 631-1338 • Fax (612) 631-3502

**ENGINEERING STATEMENT  
ON BEHALF OF DEFOREST BROADCASTING CO.  
IN SUPPORT OF A STATEMENT FOR THE RECORD  
AMENDMENT OF THE FM TABLE OF ALLOTMENTS  
CHANNEL 226A DEFOREST, WISCONSIN**

**August 2, 1993**

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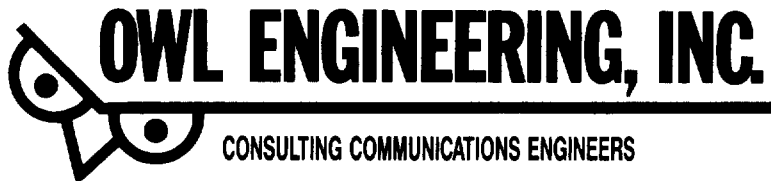
Owl Engineering, Inc. has been retained by DeForest Broadcasting Co. (hereafter "DeForest") to prepare this Engineering Statement in support of a statement for the record in response to the reply comments filed regarding the Petition for Rule Making; MM Docket No. 93-91.

DeForest has proposed amending the FM table of allotments, FCC Rule Section 73.202 as follows:

<u>Location</u>	<u>Present</u>	<u>Proposed</u>
DeForest, WI		226A
Wautoma, WI	226A	272A
Berlin, WI	272A	284A

Markesan Broadcasting Company (hereafter MBC) has offered a counterproposal to DeForest's original proposal as follows:

<u>Location</u>	<u>Present</u>	<u>Proposed</u>
DeForest, WI		226A
Wautoma, WI	226A	226A
Berlin, WI	272A	272A
Markesan, WI		284A



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The reference coordinates used for this study are:

**DeForest, WI**

**43 12' 21" North Latitude  
89 16' 45" West Longitude**

**Wautoma, WI**

**44 04' 18" North Latitude  
89 17' 30" West Longitude**

**Berlin, WI**

**43 56' 55" North Latitude  
88 59' 09" West Longitude**

**Markesan, WI**

**43 43' 53" North Latitude  
89 01' 24" West Longitude**

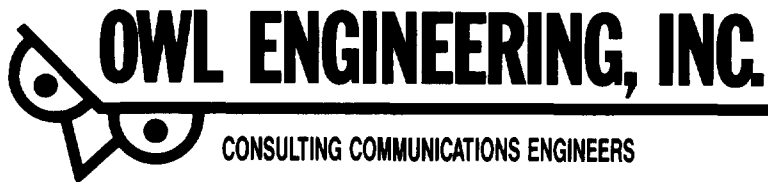


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An engineering analysis was performed to determine whether the counterproposal offered by MBC would provide first or second aural service in the Markesan, WI area. An extensive search of all AM and FM operations in the Markesan, WI area was completed. The coverage contours were calculated and plotted for analysis. The 1 mV/m (60 dBu) contour was calculated for FM stations. The 5 mV/m contour was calculated for AM stations. The results of the study are included as Engineering Exhibit E-1. As can be seen from this exhibit, radio station WPKR(FM), Waupun, WI virtually encompasses the representative coverage area of a theoretical Markesan Class A FM station. In addition to WPKR, radio station WOLX(FM) encompasses a large portion of the representative coverage area. When the coverage contours for WPKR and WOLX are taken into account with all other surrounding stations, it is clearly shown that a Class A facility operating at the reference coordinates offered by MBC will not provide first or second aural service to any service area. MBC's erroneous claim of first aural service was a result of MBC's broadcast consultant incorrectly utilizing the 3.16 mV/m (70 dBu) signal level for FM signal coverage. MBC's erroneous claim of second aural service was a result of MBC's broadcast consultant incorrectly assuming reduced facilities for radio station WOLX(FM). In addition to miscalculating FM coverage, service from AM facilities was completely omitted.



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An engineering analysis was performed to determine the number of aural services available to the community of Markesan, WI. The 1 mV/m (60 dBu) contour was utilized for FM stations. The 5 mV/m contour was utilized for AM stations. Included as Engineering Exhibit E-2 is a map showing the coverage contours of the AM and FM stations providing aural service to Markesan, WI. A list of stations is provided below for reference:

Call	Service	Community of License
WMRH	AM	Waupun, WI
WCWC	AM	Ripon, WI
WPKR	FM	Waupun, WI
WOLX	FM	Baraboo, WI
WYUR	FM	Ripon, WI *

\* Note: Radio station WYUR's licensed facility provides Markesan with a 58 dBu coverage contour. WYUR has filed an application to increase their effective radiated power to 3.9 kilowatts. The proposed new facilities will provide the entire community of Markesan, WI with a coverage contour of 60 dBu or greater.

In reply comments filed by MBC, it is claimed that only radio station WPKR(FM) provides Markesan, WI with a "protected" signal. This is not true. The service of AM stations WMRH and WCWC was neglected to be counted and the service of WOLX(FM) was "engineered out" leading to a misrepresentation of the number of aural services provided to Markesan, WI. MBC's broadcast consultant incorrectly utilized the signal strength of 70 dBu in their calculations of FM coverage.



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MBC claims that radio station WOLX(FM) does not provide Markesan with a 0.5 mV/m (54 dBu) signal. This is not true. Engineering Exhibit E-3 shows the predicted 60 and 54 dBu signal coverage of radio station WOLX(FM) and clearly shows that Markesan, WI will receive service. MBC argues that the "protected" contour of WOLX(FM) falls 12 kilometers short of Markesan, WI. MBC bases this claim on the fact that the protected contour for WOLX(FM) was calculated with the presumed maximum ERP and HAAT for a Class B station pursuant to FCC Rule Section 73.215. In the "real" world, the 54 dBu contour (as depicted in Engineering Exhibit E-3) is based on operational facilities not presumed facilities. (If radio station WOLX(FM) was to modify their facilities to specify a maximized facility at their present HAAT, a facility operating with a maximized ERP of 6.67 kilowatts would provide Markesan, WI with 54 dBu service.)

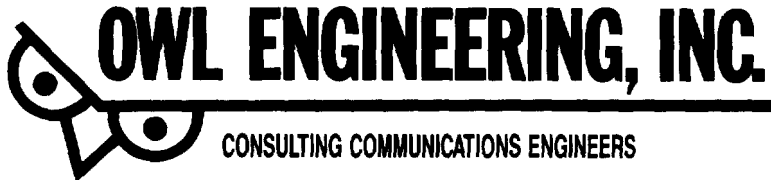




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Based on the engineering studies provided, the following conclusions can be obtained:

1. MBC's proposal does not provide first or second aural service to any service area. MBC's claim's are based on incorrect engineering analysis.
2. The community of Markesan, WI receives five (5) aural services, not one (1) as claimed by MBC. MBC's claim's are based on incorrect engineering analysis.
3. MBC incorrectly based their FM service to Markesan, WI on 70 dBu service and completely omitted any contributions from AM facilities for all calculations.



CONSULTING COMMUNICATIONS ENGINEERS

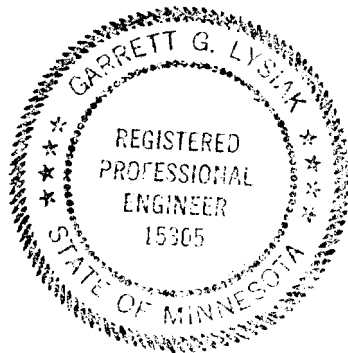
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**AFFIDAVIT**

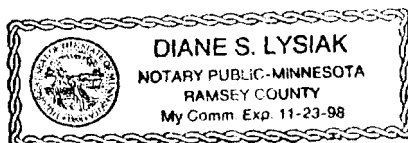
RAMSEY COUNTY                    )  
  )  
STATE OF MINNESOTA            )      ss:

Garrett G. Lysiak, being first duly sworn, says that he is president of Owl Engineering, Inc., consulting communications engineers with offices in Arden Hills, Minnesota: that his qualifications as an expert in communications engineering are a matter of record with the Federal Communications Commission: that the foregoing exhibit was prepared by him and under his direction; and that the statements contained therein are true of his own personal knowledge except those stated to information and belief and, as to those statements, verily believes them to be true and correct.



*Garrett G. Lysiak*  
Garrett G. Lysiak, P.E.

Subscribed and sworn to before me this date August 2, 1993



*Diane S. Lysiak*  
Diane S. Lysiak  
Notary Public

My commission expires November 23, 1992

# MADISON

Scale 1:250,000

20 Statute Miles

10 Kilometers

LAKE WINNEBAGO

WINNEBAGO COUNTY

OWL ENGINEERING, INC.  
ENGINEERING EXHIBIT E-1

PREDICTED RADIO COVERAGE  
AM AND FM SURROUNDING  
MARKESAN, WI

REFERENCE CONTOUR  
MARKESAN, WI

REFERENCE CONTOUR  
WAUTOMA, WI

MARKESAN

WPKR-FM

WJJO-FM

WYKY-FM

WBEV-AM

WYPR-AM

WYRO-FM

WVCN-AM

WDL-FM

WISS-AM

WISS-FM

WYOL-AM

WYUR-FM

WPDR-AM

WDDC-FM

WFDL-FM

WBN-FM

WZLZ-FM

WFOH-FM

29

30

31

32

33

34

35

89°00'

44°45'

WISCONSIN RIVER

HOBSON NATIONAL  
WILDLIFE  
REFUGE

1795



